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# CALIFORNIA ADMINISTRATIVE PROCESS: A SYNTHESIS UPDATED

John B. Molinari\*

The administrative process, as a product of modern times, has emerged as a recognized legal classification in our American jurisprudence. Its genesis is to be found in the inability of the judicial process to cope with the multiplied functions of government and the many social and complex problems brought about by the industrialization and urbanization of our country. Since the administrative process developed as an alternative to the expediency of solution by executive action, it had for its objective the accomplishment of social justice through the expedient of prompt and administrative action. Accordingly, in its development the administrative process has clashed with the traditional ideas of what is right and just as espoused by the Anglo-American judicial tradition. This confrontation resulted in compromises between the judicial process and the administrative process whereby a balance was struck which guaranteed substantial justice to the regulated individual without unduly impeding the expedient administration by the administrative agencies.<sup>1</sup>

## ADMINISTRATIVE DUE PROCESS

As a result of the accommodation between the judicial process and the administrative process it has been recognized that due process does not necessarily mean judicial process in the manner of courts of justice, but that administrative process, which is open to a minimum of judicial review, is, in appropriate cases, as much due process of law as judicial process.<sup>2</sup>

The fifth and fourteenth amendments, which forbid Congress and the states, respectively, from depriving any person of life, lib-

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<sup>1</sup> HART, AN INTRODUCTION TO ADMINISTRATIVE LAW [hereinafter cited as HART] 9-10, 461 (2d ed. 1950); Hankins, *The Necessity for Administrative Notice and Hearing*, 25 IOWA L. REV. 457 (1940).

<sup>2</sup> HART, *supra* note 1, at 459-60; *Wulzen v. Board of Supervisors*, 101 Cal. 15, 20, 35 P. 353, 354 (1894).

erty or property without due process, guarantee no particular form of procedure—their purport, rather, is to guarantee substantive rights. Accordingly, down through the years the courts have, by a case-to-case determination, taken account of the differences in the particular interest affected, the circumstances involved and the procedures prescribed by the legislative bodies for dealing with them—and have determined in each instance whether there has been a denial of due process.<sup>3</sup> The courts have, therefore, made it clear that underlying all administrative law is the constitutional precept that public officers must not act arbitrarily, capriciously, whimsically, unreasonably, fraudulently or dishonestly, and where they have found administrative action to be arbitrary, oppressive or unjust, they have struck it down as contrary to due process.<sup>4</sup>

The basic essential of procedural due process is that the administrative hearing at which facts are to be determined must be orderly and conducted in a manner meeting the requirements of fair play, measured by what the courts deem to be fair, just and appropriate under the circumstances.<sup>5</sup> These basic requirements include the following: There must be a fair and open hearing; the parties must be apprised of the evidence to be considered; the evidence must be produced at the hearing by witnesses present or by authenticated documents, maps or photographs; there must be an opportunity to inspect documents, to cross-examine witnesses within reasonable limits and to offer evidence in explanation or rebuttal.<sup>6</sup> Administrative agencies, however, are not bound by the strict rules of evidence which obtain in the courts.<sup>7</sup> Accordingly, the standard of admissibility, in the absence of a contrary rule expressly controlling the proceedings of the particular agency, is that any relevant evidence is admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such

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<sup>3</sup> *FCC v. WJR, Goodwill Stations, Inc.*, 337 U.S. 265, 277 (1949).

<sup>4</sup> 2 CAL. JUR. 2d, *Administrative Law and Procedure* § 38, at 75-79 (1952).

<sup>5</sup> *Morgan v. United States*, 304 U.S. 1, 14-15 (1937); *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886); *Desert Turf Club v. Board of Supervisors*, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 887 (1956); *Bandini Estate Co. v. County of Los Angeles*, 28 Cal. App. 2d 224, 229-30, 82 P.2d 185, 188-89 (1938).

<sup>6</sup> *Morgan v. United States*, 304 U.S. 1 (1937); *ICC v. Louisville & N.R.R.*, 227 U.S. 88, 91, 93 (1912); *La Prada v. Department of Water & Power*, 27 Cal. 2d 47, 51-52, 162 P.2d 13, 16 (1945); *Desert Turf Club v. Board of Supervisors*, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 887 (1956).

<sup>7</sup> *Aluisi v. County of Fresno*, 178 Cal. App. 2d 443, 451-52, 2 Cal. Rptr. 779, 783 (1960); *Jenner v. City Council*, 164 Cal. App. 2d 490, 496, 331 P.2d 176, 180-81 (1958); *Desert Turf Club v. Board of Supervisors*, 141 Cal. App. 2d 446, 455, 296 P.2d 882, 887 (1956). See CAL. GOV'T CODE § 11513(c) (West 1966).

evidence over objections in civil actions.<sup>8</sup> Although rumor or uncorroborated hearsay is not competent evidence,<sup>9</sup> hearsay may be used for the purpose of supplementing or explaining other evidence.<sup>10</sup>

The principle that the nature of the administrative process is such that the quality of the evidence before the agency or board need not measure up to evidence normally introduced in judicial proceedings is demonstrated in those cases in which the courts have sanctioned opinion evidence in hearings before local boards.<sup>11</sup> The rationale of these cases which have permitted opinion evidence in generalized statements, including the statements of attorneys representing the involved parties, is that the nature of the hearing itself evokes such presentation.<sup>12</sup> Accordingly, it is apparent that the rubric which runs through the cases discussing the quality of the evidence before administrative boards and agencies is that the courts have regarded the weight and sufficiency of the evidence as matters of administrative discretion and have sustained the decision of the board or agency if substantial evidence supports it.<sup>13</sup>

### JUDICIAL REVIEW

The history of the development of administrative law discloses a conflict between those who distrust administrative agencies and those regarding them as useful and essential instruments of govern-

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<sup>8</sup> CAL. GOV'T CODE § 11513(c) (West 1966); 2 CAL. JUR. 2d, *Administrative Law and Procedure*, § 140, at 242-43 (1952). See *Werner v. State Bar*, 24 Cal. 2d 611, 615, 150 P.2d 892, 893-94 (1944); *Suckow v. Alderson*, 182 Cal. 247, 251, 187 P. 965, 967 (1920).

<sup>9</sup> *Walker v. City of San Gabriel*, 20 Cal. 2d 879, 881, 129 P.2d 349, 350 (1942); *Armistead v. City of Los Angeles*, 152 Cal. App. 2d 319, 321, 313 P.2d 127, 130 (1957); *Jenner v. City Council*, 164 Cal. App. 2d 490, 496, 331 P.2d 176, 180 (1953).

<sup>10</sup> CAL. GOV'T CODE § 11513(c) (West 1966); *DeMartini v. Department of Alcoholic Beverage Control*, 215 Cal. App. 2d 787, 809, 30 Cal. Rptr. 668, 680 (1963); *Jenner v. City Council*, 164 Cal. App. 2d 490, 496, 331 P.2d 176, 180 (1953). In *Savelli v. Board of Medical Examiners*, 229 Cal. App. 2d 124, 139, 40 Cal. Rptr. 171, 180 (1964), the court held that hearsay which is objectionable may be considered in support of a finding where no objection is interposed. See also *August v. Department of Motor Vehicles*, 264 Cal. App. 2d 52, 64, 70 Cal. Rptr. 172, 180 (1968). *Contra*, *Swegle v. State Bd. of Equalization*, 125 Cal. App. 2d 432, 439, 270 P.2d 518, 522 (1954) (Dooling, J., concurring); B. WITKIN, CALIFORNIA EVIDENCE 31 (2d ed. 1966).

<sup>11</sup> *Cow Hollow Improvement Club v. Di Bene*, 245 Cal. App. 2d 160, 172, 53 Cal. Rptr. 610, 618 (1966); *Iscoff v. Police Comm'n*, 222 Cal. App. 2d 395, 410, 35 Cal. Rptr. 184, 199 (1963); *Floresta, Inc., v. City Council*, 190 Cal. App. 2d 599, 608-09, 12 Cal. Rptr. 182, 187-88 (1961).

<sup>12</sup> In *Cow Hollow Improvement Club v. Di Bene*, 245 Cal. App. 2d 160, 172, 53 Cal. Rptr. 610, 618 (1966), *Iscoff v. Police Comm'n*, 222 Cal. App. 2d 395, 410, 35 Cal. Rptr. 184, 199 (1963), and *Floresta, Inc., v. City Council*, 190 Cal. App. 2d 599, 609, 12 Cal. Rptr. 182, 188 (1961), the purpose of the opinion evidence was recognized to be the weighing of social and public advantages for the issuance of the permit or zoning variance in question and not as proof of a precise fact.

<sup>13</sup> See *Iscoff v. Police Comm'n*, 222 Cal. App. 2d 395, 35 Cal. Rptr. 184 (1963); *Floresta, Inc., v. City Council*, 190 Cal. App. 2d 599, 12 Cal. Rptr. 182 (1961).

ment. Those who distrust these agencies have sought to minimize their powers by subjecting them to the maximum court review, while those regarding administrative agencies as necessary and valuable instruments of law enforcement, although conceding the desirability of some court review in all cases, have sought to limit court review so that the utility of the agencies would not be completely frustrated.

In California a serious attempt to reconcile these two points of view has been made through the use of a special proceeding to obtain judicial review of adjudicatory decisions of state-level governmental agencies. This proceeding, described as "administrative mandamus," finds the rules for its application in Code of Civil Procedure section 1094.5 and, where not inconsistent with that section, in the provisions governing ordinary mandamus.<sup>14</sup> Under this proceeding the inquiry extends to whether the agency proceeded without or in excess of its jurisdiction, whether there was a fair hearing and whether there was any prejudicial abuse of discretion.<sup>15</sup> Abuse of discretion is established if the respondent has not proceeded in the manner required by law or the order or decision is not supported by the findings or the findings are not supported by the evidence.<sup>16</sup>

In considering whether an agency has proceeded without or in excess of its jurisdiction or whether there was a fair hearing the reviewing court exercises a maximum of judicial review. Under the due process clauses of the federal and state Constitutions the validity of the substantive provisions of regulatory statutes or regulations and the determination whether the procedures pursuant to these statutes and regulations were due and just and fairly conducted are conditioned upon the opinion of judges. This conditioning results from the position of "judicial supremacy" in which American courts are placed by virtue of the prerogative they possess under the American system to interpret the validity of the substantive and procedural provisions of statutes and regulations.<sup>17</sup> Upon the same basis courts exercise maximum review in cases where the inquiry on review is whether the respondent agency has abused its discretion in not proceeding in the manner required by law or whether the order or decision is supported by the findings.

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<sup>14</sup> CAL. CODE CIV. PROC. §§ 1084-86 (West 1955), 1087 (West Supp. 1969), 1088-94 (West 1955), 1095 (West Supp. 1969), 1096-97 (West 1955), 1107-09 (West Supp. 1969), 1110-10(b) (West 1955).

<sup>15</sup> CAL. CODE CIV. PROC. § 1094.5(b) (West 1955); *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 320, 26 Cal. Rptr. 550, 555 (1962). See CALIFORNIA ADMINISTRATIVE MANDAMUS, xv (Cal. Cont. Ed. of the Bar 1966).

<sup>16</sup> *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 320, 26 Cal. Rptr. 550, 555. See CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at xv.

<sup>17</sup> HART, *supra* note 1, at 459-60.

Where it is claimed that the findings are not supported by the evidence, instances arise where there is a maximum of judicial review and those where the review is minimum. In cases in which the superior court is authorized by law to exercise its independent judgment<sup>18</sup> on the evidence the court exercises its judicial supremacy because it determines whether the findings are supported by the weight of the evidence.<sup>19</sup> If the superior court determines that the findings are not supported by the weight of the evidence, abuse of discretion is established.<sup>20</sup> Thus in California as a result of statute or decisional law the "independent judgment" test is applied where the administrative adjudication affected a vested right and the adjudicating agency was a state-level agency of legislative origin.<sup>21</sup>

In cases where the superior court is not authorized by law to exercise its independent judgment on the evidence the review may be said to be minimal. In such cases the applicable test is the "substantial evidence" test.<sup>22</sup> Under this test the superior court is restricted to determining whether the findings of the administrative agency are supported by substantial evidence in the light of the whole record.<sup>23</sup> Accordingly, in California this test is applied to decisions of administrative agencies affecting non-vested rights, regardless of the type of state agency, constitutional agencies and local agencies.<sup>24</sup>

Apropos the required test on a review of the evidence, it should be noted here that when the superior court has rendered its judgment on mandamus and the judgment is appealed, the appellate court is governed by the substantial evidence rule. Its scope of review is to determine whether the evidence, viewed in the light most favorable to the respondent, sustains the findings made by the trial court. This rule applies whether the appellate court is reviewing the findings of the superior court where that court has exercised independent judgment or whether the findings involve the decision of the

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<sup>18</sup> This test is variously referred to as the "independent judgment test," the "weight of the evidence test," the "trial de novo test," and the "limited trial de novo test." CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at 64-65.

<sup>19</sup> Under the "independent judgment test" the superior court is not confined to the agency record but may receive additional evidence. *Dare v. Board of Medical Examiners*, 21 Cal. 2d 790, 795, 797-800, 136 P.2d 304, 307-10 (1943).

<sup>20</sup> CAL. CODE CIV. PROC. § 1094.5(c) (West 1955); *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 320, 26 Cal. Rptr. 550, 555 (1962).

<sup>21</sup> See discussion and analysis in CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at 65-67, and statutes and cases cited and reviewed therein.

<sup>22</sup> CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at 65.

<sup>23</sup> CAL. CODE CIV. PROC. § 1094.5(c) (West 1955); *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 320-21, 26 Cal. Rptr. 550, 555 (1962); CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at 65.

<sup>24</sup> See discussion and analysis in CALIFORNIA ADMINISTRATIVE MANDAMUS, *supra* note 15, at 74-86, and statutes and cases cited therein.

local administrative agency. Where the trial court has properly exercised its independent judgment the reviewing court is confined to the evidence received by the superior court; where the superior court has been required to apply the substantial evidence test the appellate court is limited to the evidence in the agency record.<sup>25</sup>

### CRIMINAL PROCESS

Although, as pointed out above, due process is not in all cases necessarily judicial process, criminal process must be judicial process.<sup>26</sup> In recent times the growing awareness of individual rights which are constitutionally protected has eroded the traditional distinctions made upon the basis that an administrative proceeding is a "civil action" and consequently not governed by legal doctrine in the criminal law area.

In the landmark case of *In re Gault*,<sup>27</sup> which extended the due process clause of the fourteenth amendment to juvenile court delinquency hearings, the Supreme Court unequivocally stated that the privilege against self-incrimination can be claimed in *any* proceeding, be it criminal, civil, administrative or judicial.<sup>28</sup> This privilege, when invoked, carries with it the guarantee that the person who exercises the right to remain silent shall suffer no penalty for such silence.<sup>29</sup> Accordingly, in this context "penalty" is not restricted to fine or imprisonment, but includes the imposition of any sanction which makes asserting of the privilege "costly."<sup>30</sup> In *Spevack v. Klein*,<sup>31</sup> the United States Supreme Court held, in a review of a disbarment proceeding, that the privilege against self-incrimination extends to proceedings where the deprivation of a livelihood can result as a price for asserting it.

In the light of the foregoing principles declared by the United States Supreme Court which have applied the fifth amendment privilege against self-incrimination to the states through the fourteenth amendment, it would appear that the right to assert the privilege

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<sup>25</sup> *Moran v. Board of Medical Examiners*, 32 Cal. 2d 301, 308-09, 196 P.2d 20, 25 (1948); *Le Strange v. City of Berkeley*, 210 Cal. App. 2d 313, 321, 26 Cal. Rptr. 550, 555 (1962); *Thain v. City of Palo Alto*, 207 Cal. App. 2d 173, 193, 24 Cal. Rptr. 515, 527 (1962); *Endo v. State Bd. of Equalization*, 143 Cal. App. 2d 395, 399, 300 P.2d 366, 368-69 (1956).

<sup>26</sup> HART, *supra* note 1, at 460.

<sup>27</sup> 387 U.S. 1 (1967).

<sup>28</sup> *Id.* at 47-50; see *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 94 (1964) (White, J., concurring).

<sup>29</sup> *Malloy v. Hogan*, 378 U.S. 1 (1964).

<sup>30</sup> *Spevack v. Klein*, 385 U.S. 511, 514-15 (1967); *Griffin v. California*, 380 U.S. 609, 614 (1965).

<sup>31</sup> 385 U.S. 511, 514 (1967).

against self-incrimination may be asserted in any administrative proceeding where there may be an imposition of any sanction which makes the assertion of the privilege "costly" to the person invoking the privilege. In view of the holding in *Spevack*, is the revocation of a license a "costly" penalty so as to permit the licensee the right to assert the privilege in disciplinary proceedings? Is the provision in California Government Code section 11513, subdivision (c), that in hearings under the Administrative Procedure Act<sup>32</sup> a respondent who has not testified in his own behalf may be called and examined as if under cross-examination, tempered by the holding in *Spevack*?

In *Goss v. Department of Motor Vehicles*,<sup>33</sup> the California Court of Appeal held that since a motor vehicle license suspension hearing conducted by the Department of Motor Vehicles was not criminal in nature the licensee was subject to be called and cross-examined by the hearing officer. The opinion does not disclose whether the licensee invoked the privilege against self-incrimination, but it does state that the licensee's own testimony provided sufficient evidence to support the Department's suspension order.<sup>34</sup> *Goss* may be distinguishable from *Spevack* on the basis that in *Goss* the penalty involved was the privilege to drive a motor vehicle, while in *Spevack* the penalty was the dishonor of disbarment and the deprivation of a livelihood.<sup>35</sup> The validity of such a distinction will depend, it seems, upon the interpretation placed in future cases as to what was meant by the Supreme Court in *Griffin v. California*<sup>36</sup> when it referred to the imposition of any sanction which makes assertion of the fifth amendment privilege "costly." Such interpretation will also bring into question the holding in *Goldberg v. Regents of the University of California*<sup>37</sup> that the privilege against self-incrimination did not have to be recognized in disciplinary proceedings contemplating suspension or dismissal brought against university students pursuant to procedures and rules of evidence adopted by the University. In *Goldberg* the appellate court specifically noted that the more recent federal cases<sup>38</sup> hold that attendance in a state university is no longer a privilege but is now

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<sup>32</sup> CAL. GOV'T CODE §§ 11370-11528 (West 1966).

<sup>33</sup> 264 Cal. App. 2d 268, 70 Cal. Rptr. 447 (1968).

<sup>34</sup> No petition for a hearing in the California Supreme Court was filed. *Goss v. Department of Motor Vehicles*, 264 Cal. App. 2d 268, 270, 70 Cal. Rptr. 447, 448 (1968).

<sup>35</sup> Apparently the argument could be made in a given case that the suspension or revocation of the privilege to drive a motor vehicle results in the deprivation of livelihood.

<sup>36</sup> 380 U.S. 609 (1965).

<sup>37</sup> 248 Cal. App. 2d 867, 883, 57 Cal. Rptr. 463, 474-75 (1967).

<sup>38</sup> *Dixon v. Alabama State Bd. of Education*, 294 F.2d 150 (5th Cir. 1961); *Knight v. State Bd. of Education*, 200 F. Supp. 174 (M.D. Tenn. 1961).



regarded as an important benefit.<sup>39</sup> The question postulated, then, in view of the federal decisions, is whether the loss of such a benefit is "costly" within the meaning of *Griffin* and *Spevack*.

In the area of search and seizure the question has been postulated whether the policy of excluding evidence seized by an unlawful search and seizure applies to administrative hearings.<sup>40</sup> In *People v. One 1960 Cadillac Coupe*,<sup>41</sup> the California Supreme Court applied the exclusionary rule to proceedings for forfeiture of property, which are civil in nature, upon the rationale that such proceedings bear "a close identity to the aims and objects of criminal enforcement" and that "on policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property."<sup>42</sup> This rationale was assumed to be applicable to an administrative hearing where the proceeding contemplates the deprivation of a license in *Elder v. Board of Medical Examiners*.<sup>43</sup> Although not specifically required to pass upon the question since no evidence resulting from a search and seizure was actually admitted into evidence, the appellate court made that assumption when it observed that the deprivation of a license to practice medicine which was contemplated in the administrative proceeding under review would result in the deprivation of a property right. In view of the holding in the *Cadillac* case, as interpreted by *Elder*, it appears that it is now the law in California that the policy of excluding evidence seized by unlawful search and seizure applies to administrative proceedings which contemplate the deprivation of property or a property right.<sup>44</sup>

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<sup>39</sup> *Goldberg v. Regents of the Univ. of California*, 248 Cal. App. 2d 867, 875-76, 57 Cal. Rptr. 463, 469 (1967).

<sup>40</sup> *Pierce v. Board of Nursing Education & Nurse Registration*, 255 Cal. App. 2d 463, 466, 63 Cal. Rptr. 107, 109 (1967). *Elder v. Board of Medical Examiners*, 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966); *Thorp v. Department of Alcoholic Beverage Control*, 175 Cal. App. 2d 489, 492, 346 P.2d 433, 436 (1959).

<sup>41</sup> 62 Cal. 2d 92, 41 Cal. Rptr. 290 (1964).

<sup>42</sup> *Id.* at 96-97, 41 Cal. Rptr. at 293.

<sup>43</sup> 241 Cal. App. 2d 246, 260, 50 Cal. Rptr. 304, 315 (1966).

<sup>44</sup> The basis upon which the exclusionary rule was held not to apply to administrative proceedings contemplating license revocation was that the state had a right to inspect and investigate the business of the licensee. See *Cooley v. State Bd. of Funeral Directors & Embalmers*, 141 Cal. App. 2d 293, 298, 296 P.2d 588, 591 (1956). Apparently this rationale has now been dissipated by recent United States Supreme Court decisions which hold that administrative searches by municipal health and safety inspectors constitute significant intrusions upon interests protected by the fourth amendment. See *Camara v. Municipal Court*, 387 U.S. 523, 534 (1967); See *v. Seattle*, 387 U.S. 541, 545-46 (1967). These cases hold that a citizen is entitled to refuse entry to the inspector unless there is a prior judicial determination of the reasonableness of the inspection as evidenced by a search warrant. In light of these decisions it is doubtful that the right to make regulatory inspections without a warrant continues. See also *Parrish v. Civil Service Comm'n*, 66 Cal. 2d 260, 57 Cal. Rptr. 623 (1967) (search of welfare recipient's home to seek out welfare fraud).

If evidence resulting from an illegal search and seizure may not be admitted in an administrative proceeding, does not the criminal law doctrine announced by the United States Supreme Court in *Miranda v. Arizona*,<sup>45</sup> that a person is entitled to be advised of his right to remain silent and that he is entitled to counsel, apply in administrative proceedings? In *In re Acuna*,<sup>46</sup> the California Court of Appeal held that the constitutional warnings expressed in *Miranda*, as well as those expounded in *Escobedo*<sup>47</sup> and *Dorado*,<sup>48</sup> do not apply to juvenile court litigation. *Acuna* was decided prior to *Gault*, which applied the *Miranda* doctrine to a juvenile court proceeding. In view of *Gault* it now seems clear that the rationale utilized by *Acuna*, that a juvenile court proceeding should be treated as a civil proceeding, is no longer valid.

### PREHEARING DISCOVERY

In *Shively v. Stewart*<sup>49</sup> the California Supreme Court held that although the Administrative Procedure Act<sup>50</sup> contains no express provisions authorizing prehearing discovery in administrative proceedings,<sup>51</sup> such discovery may be had under appropriate circumstances upon the rationale that the legislature has left to the courts, as in the case of criminal discovery, the question whether modern concepts of administrative adjudication call for common law rules to permit and regulate the use of the agencies' subpoena power to secure prehearing discovery.<sup>52</sup> In support of this conclusion the reviewing court observed that "[s]tatutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review."<sup>53</sup> Accordingly, "the specific holding in *Shively* is that the

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<sup>45</sup> 384 U.S. 436 (1966).

<sup>46</sup> 245 Cal. App. 2d 388, 53 Cal. Rptr. 884 (1966).

<sup>47</sup> *Escobedo v. Illinois*, 378 U.S. 478 (1964).

<sup>48</sup> *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169 (1965).

<sup>49</sup> 65 Cal. 2d 475, 55 Cal. Rptr. 217 (1966).

<sup>50</sup> CAL. GOV'T CODE §§ 11501-24 (West 1966).

<sup>51</sup> See JUDICIAL COUNCIL OF CALIFORNIA, TENTH BIENNIAL REPORT (1944); Comment, *Discovery Prior to Administrative Adjudications—A Statutory Proposal*, 52 CALIF. L. REV. 823 (1964).

<sup>52</sup> *Shively v. Stewart*, 65 Cal. 2d 475, 478-79, 55 Cal. Rptr. 217, 219 (1966).

<sup>53</sup> *Id.* at 479, 55 Cal. Rptr. at 219. See *Brotsky v. State Bar*, 57 Cal. 2d 287, 19 Cal. Rptr. 153 (1962); *Fascination, Inc., v. Hoover*, 39 Cal. 2d 260, 246 P.2d 656 (1952); *English v. City of Long Beach*, 35 Cal. 2d 155, 217 P.2d 22 (1950).

"These cases illustrate Professor Davis' observation that the law determining the adequacy of administrative hearings 'is mostly judge-made law . . .' and 'the standards are essentially the same whether judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law.'" *Shively v. Stewart*, 65 Cal. 2d 475, 479, 55 Cal. Rptr. 217, 219 (1966) [citing K. DAVIS, 1 ADMINISTRATIVE LAW TREATISE 506 (1958)].

subpoena duces tecum authorized by section 11510 of the Government Code may be used for discovery purposes and is not restricted to the obtaining of evidence to be used *at* the hearing."<sup>54</sup>

Although *Shively* announced the broad principle that courts can apply common law rules whenever it appears necessary to promote fair hearings and effective judicial review, that principle was restricted in its application to cases in which the criminal law analogy is appropriate.<sup>55</sup> In *Shively*, the petitioners seeking discovery were physicians who were facing disciplinary proceedings which could have resulted in revocation of their licenses to practice. Accordingly, the supreme court, noting that a disciplinary proceeding has a punitive character, held that the petitioners were entitled to prehearing discovery of the written statements of witnesses and copies of petitioners' writings with respect to treatment given the women upon whom they were alleged to have performed abortions.

Subsequent to *Shively*, *Everett v. Gordon*<sup>56</sup> reiterated the rule that the form of discovery in administrative proceedings is limited to that akin to discovery allowed in criminal proceedings, with the observation that "[t]he principle upon which *Shively* is based is that the accused in a disciplinary proceeding should have the same rights of discovery as the accused in a criminal proceeding."<sup>57</sup>

Effective November 13, 1968, sections 11507.5 and 11507.6 were added to the Government Code, providing for the exclusive right to and method of discovery in any proceeding governed by the adjudication provisions<sup>58</sup> of the Administrative Procedure Act. These provisions are those which deal with hearings which determine whether a right, authority, license or privilege should be revoked, suspended, limited or conditioned.<sup>59</sup> In *Romero v. Hern*<sup>60</sup> the appellate court compared the discovery provided for in section 11507.6 with the discovery theretofore allowed by *Shively* and *Everett* in administrative proceedings and concluded that there was practically no difference between the two methods, except that section 11507.6 eliminates the requirement of showing good cause for obtaining the information required by the section to be disclosed, while under the *Shively* rule good cause to receive it must be shown as to some of the information.<sup>61</sup> In *Romero* the reviewing

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<sup>54</sup> *Everett v. Gordon*, 266 Cal. App. 2d 667, 670, 72 Cal. Rptr. 379, 381 (1968).

<sup>55</sup> 65 Cal. 2d 475, 479, 55 Cal. Rptr. 217, 219 (1966).

<sup>56</sup> 266 Cal. App. 2d 667, 72 Cal. Rptr. 379 (1968).

<sup>57</sup> *Id.* at 670, 72 Cal. Rptr. at 381.

<sup>58</sup> CAL. GOV'T CODE §§ 11500-28 (West 1966).

<sup>59</sup> CAL. GOV'T CODE §§ 11503-04 (West 1966).

<sup>60</sup> 276 A.C.A. 947, 81 Cal. Rptr. 281 (1969).

<sup>61</sup> *Id.* at 953, 81 Cal. Rptr. at 286.

court held that, although neither *Shively* nor *Everett* discusses the right to interrogatories, and although section 11507.6 does not mention interrogatories, no logical reason exists why interrogatories cannot be used for the production of evidentiary material properly subject to discovery.<sup>62</sup>

A study of *Shively*, *Everett* and *Romero* discloses that each of these cases dealt with administrative disciplinary proceedings wherein the petitioners were subject to the loss of the license to engage in their respective professions or occupations. These cases were apparently articulating the same rationale that was stated in *Griffin*, *Spevack*, *Cadillac* and *Elder* that, where administrative proceedings bear a close identity to the aims and objects of criminal enforcement and contemplate the deprivation of one's liberty, property or property rights, the procedural safeguards which are appropriate in criminal cases are by analogy appropriate in administrative proceedings. This rationale appears, also, to have been carried into section 11507.6, since that section deals with discovery in proceedings which contemplate the suspension, revocation or limitation of a right, license or privilege.

In sum, discovery has now been extended to administrative proceedings where the criminal law analogy is appropriate. While such prehearing discovery is now provided for by statute in administrative adjudications under the Administrative Procedure Act, it seems clear that under the rationale of *Shively* prehearing discovery is likewise available in administrative proceedings not encompassed by the Administrative Procedure Act where the criminal law analogy is appropriate.

#### DISCERNIBLE TRENDS

It is apparent that there is a trend in the law which is affecting administrative proceedings. Although this trend may appear to some to tend toward making the administrative process excessively legalistic and technical, it is apparent that the significant directions have been in the area of administrative process, which bears a close identity to the criminal process. This trend is in keeping with the recognized principle that while due process is not in all cases judicial process, criminal process must be judicial process if it is to satisfy the requirements of the due process clauses of the United States Constitution and the California Constitution. Accordingly, because of the growing awareness of rights which are constitutionally protected, the traditional distinctions which have been made on the

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<sup>62</sup> *Id.*

basis that an administrative proceeding is a "civil action" and therefore not governed by legal doctrine have yielded to the supremacy of the legal doctrine where the administrative process can result in the deprivation of liberty, property or property rights.

#### NEW DIRECTIONS

The California cases have consistently emphasized that the administrative hearing at which facts are to be determined must be orderly and conducted in a manner meeting the requirements of fair play. Accordingly, the courts will continue to perform the important function of determining whether certain procedures practiced by administrative agencies provide procedural due process.

It is not uncommon for a reviewing court to be presented in cases involving local boards and agencies with a meager and obscure record, and sometimes no record at all, of the proceedings before such boards and agencies. In this situation the appellate court finds it difficult and, in some instances impossible, to determine whether substantial evidence has been presented to the agency or whether there has been a deprivation of procedural due process. In such cases the reviewing court is left no alternative but to affirm the decision of the agency on the basis of the legalistic presumption of regularity which prevails in the absence of countervailing evidence. Sometimes the establishment of a record is attempted through the unsatisfactory method of recreating in the superior court the evidence adduced before the agency.

Since hearings held by local boards and commissions are, more often than not, presided over by persons who are not lawyers, they may not be as sensitive to the demands of due process or the normal routine of law as they would be if presided over by lawyers. It is a matter of common knowledge, moreover, that many local boards, agencies and commissions consider lobbying through individual pressure, group pressure or mass pressure to be consistent with the proper functions of their office. This pressure is often exerted outside the formal hearings. One can only speculate as to the effect of this pressure on controversial matters in which the local board or agency must act in a quasi-judicial capacity. Certainly, the record before the reviewing court will not include what a member of the board or agency may have considered as "evidence" when such came to him outside the formal hearing, and, hence, is dehors the record.

Obviously we cannot expect that boards and commissions be composed entirely of lawyers. But we can expect that boards and commissions acting in a quasi-judicial capacity function as admin-

istrative courts. On the local level it seems expedient that the communities should provide their boards and commissions with hearing officers who shall have been admitted to practice law in this state. The efficacy of the hearing officer procedure has been abundantly demonstrated on the state level with respect to the agencies under the purview of the Administrative Procedure Act.<sup>63</sup> The hearing officer provides the impartiality of a fair hearing since his function is to separate judging from accusing.<sup>64</sup> It is his function to rule on the admission or exclusion of evidence and to advise the agency on matters of law.<sup>65</sup> He may hear the matter alone or the agency may hear the matter with him.<sup>66</sup> If he hears the matter alone it is his duty to prepare a proposed decision which the agency may adopt as its own; if the agency itself hears the case, the hearing officer presides at the hearing and rules on the admission and exclusion of evidence.<sup>67</sup> A valuable function of the hearing officer procedure is that it provides for an adequate record and thus assures that the agency's decision stands scrutiny in the light of the record and the record alone. In sum, this procedure is not only time saving and conducive to an expeditious hearing, but it brings the judicial approach to the meaning of the law and rules administered by the agency.<sup>68</sup>

It is also incumbent that the bench, bar, the legislature and the citizenry coordinate their efforts to remove from the administrative law of our state the unrealistic and impractical distinctions which have caused no small measure of confusion in the administrative process. These are the distinctions based upon legislative and constitutional provisions and the decisional law which provide for court review in some types of administrative decisions and no review at all in others, but instead a complete retrial in the superior court, where even on issues of fact the administrative decision is given no weight at all. These are the distinctions which require the substantial evidence test in some situations and the independent judgment test in others. Thus the courts are permitted to substitute themselves for the agency where the administrative adjudication affected vested rights and the adjudicating agency was a state level agency of legislative origin; but we restrict the courts to the substantial evidence test where the administrative decisions affected non-vested rights, regardless of the type of agency, where the deci-

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<sup>63</sup> See CAL. GOV'T CODE § 11502 (West 1966).

<sup>64</sup> Kuchman, *The Role of the Hearing Officer—a Private Practitioner's Point of View*, 44 CALIF. L. REV. 211, 212-13 (1956).

<sup>65</sup> See CAL. GOV'T CODE § 11512(b) (West 1966).

<sup>66</sup> See CAL. GOV'T CODE § 11512(a) (West 1966).

<sup>67</sup> See CAL. GOV'T CODE §§ 11512, 11517 (West 1966).

<sup>68</sup> See Kuchman, *supra* note 64, at 212.

sions, even though involving vested rights, are those of administrative agencies of constitutional origin and where the administrative decisions are those of local agencies. These distinctions appear unnecessary when we consider that the substantial evidence test is broad and flexible enough to enable a reviewing court to correct whatever ascertainable abuses may have arisen in the administrative adjudication. Moreover, this test recognizes the proper role of the administrative agency.

### CONCLUSION

The role of the courts in the area of administrative process should be one of supervision and control to prevent abuse, unfairness and arbitrary action in administrative proceedings. It should not, however, substitute itself for the agency or perform the agency's function. Each—the court and the agency—has its well-defined sphere of action. The court should review administrative decisions where there is a claim of errors in law, arbitrary findings of fact, and failure to follow procedure prescribed by law, or a deprivation of due process. The agency, in turn, should have the power to make decisions of disputed issues of fact with some degree of finality, and administrative findings should be deemed final if there is substantial evidence to support them. Accordingly, with respect to issues of fact, the role of the court should be one of review to determine whether the findings of the agency are supported by substantial evidence and not to reweigh the evidence and thus submit its judgment for that of the agency. When the court substitutes its judgment for that of the agency, it reduces the agency's administrative hearing to nothing more than waste motion. In these days when court calendars are congested and court delays are a matter of grave concern, courts should not be called upon to do the agency's work all over again.

It is now an accepted fact, after three decades of experimentation, that administrative law is here to stay and that by a steady and pragmatic growth it has emerged as a recognized classification in our jurisprudence. Since the administrative process determines controversies, declares rights, interprets statutes and rules and inflicts penalties, it performs the same fundamental task as the courts. Since they perform a common task, the court and the agency must function in a system which recognizes that each has a proper role. This role demands of the agency that it function like a court because, in essence, it is truly an administrative court.